

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 23675  
Issued to: Gary D. Lewis

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2370

Gary D. Lewis

This appeal has been taken in accordance with 46 U. S. C. 239(g) and 46 CFR 5.30-1.

By order dated 17 March 1983, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's license for six months on twelve months' probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator on board the M/V EXXON CRYSTAL RIVER under authority of the license above captioned, on or about 10 February 1983, Appellant negligently failed to safely navigate a flotilla consisting of the M/V EXXON CRYSTAL RIVER and EXXON BARGE NUMBER 32, resulting in an allision between the flotilla and the Koch Oil Terminal Pier in Newport News, Virginia.

The hearing was held at Norfolk, Virginia on 17 March 1983.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of six witnesses and five exhibits.

In defense, Appellant offered the testimony of two witnesses.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then entered an order suspending the license issued to Appellant for a period of six months on twelve months' probation.

The entire decision was served on 17 March 1983. Appeal was timely filed on 25 March 1983 and perfected on 8 July 1983.

FINDINGS OF FACT

On 10 February 1983, Appellant was serving as Operator of the

M/V EXXON CRYSTAL RIVER, a towing vessel, and acting under authority of his license while the vessel was maneuvering in the vicinity of the Koch Fuel Oil Terminal Pier in the port of Newport News, Virginia.

The Koch Fuel Oil Terminal consists of a tank farm and a pier. Pipelines run between the storage tanks and the tanker and barge berths along the pier. For the most part, the pier is 5 to 10 feet wide and consists of a superstructure to support the pipelines. The tanker berth in question is located midway down the pier on its west side. There are barge berths on both sides of the pier toward shore from the tanker berth. Along both sides of the pier is a fender system consisting of 13 pile clusters and cement-reinforced dolphins. The chart of the area, a copy which is included in the record, shows the shallow area about the piers. There are charted shoals located 300 to 400 feet from the east side of the pier. Koch maintains a dredged channel 130 feet long along the east side.

The early morning of 10 February 1983 was dark and the pier was not lighted. Maximum ebb current was at 0035, with the following slack current at 0347. At the time of the allision, there was an ebb current of approximately 1 1/2 knots flowing to the east. The wind was out of the south at 10 to 15 miles per hour.

The M/V EXXON CRYSTAL RIVER towing the barge EXXON NUMBER 32 ahead arrived at the terminal at approximately 2315 on 9 February 1983. At that time the other Operator, Mr. Twiford, was on watch. He berthed the flotilla on the west side of the pier at the tanker berth.

Appellant took command of the flotilla at 0000 on 10 February 1983. After being relieved by Appellant, Mr. Twiford left the wheelhouse and went to his cabin. At about this time some earlier confusion was resolved, and it was decided that the barge would be unloaded at the facility. The terminal operator, Mr. Ted Brown, told Appellant that the barge would have to be unloaded at the barge dock located closer to shore on the west side of the pier. He also stated that the barge could be unloaded on either side of the pier, as there was another barge dock on the east side.

Appellant was uncertain whether the flotilla as made up would fit at the barge dock at the west side of the pier because of the configuration of the berth, dolphins and the pier. He also expressed a reluctance to move the barge to the east side of the pier because of the current and depth of water. One of the employees of the Koch facility told Appellant that the water was deep enough on the east side of the pier. Appellant, however, did not consult a chart to verify what he had been told.

At approximately 0035, Appellant attempted to move the flotilla to the east side of the pier. While doing this, he stationed Mr. McKennon, a deckhand, at the bow of the barge. The flotilla crabbed at an angle against the prevailing current as it approached the pier. At approximately 0100 the barge allided with the pier between the barge and tanker berths on the east side of the pier. The force of the allision destroyed the structure supporting the pipelines and two 13 pile cluster dolphins. The bow of the barge passed completely through the pier and came to rest approximately 50 feet on the west side of the pier. There were no personnel injuries or pollution as a result of the allision. Mr. McKennon retreated to the wheelhouse of the tug as the barge proceeded into the pier.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant urges:

1. That the presumption of negligence accompanying an allision should not be applied to suspension and revocation proceedings; and

2. The presumption was rebutted because Appellant acted prudently.

APPEARANCE: Guilford D. Ware, Esq of Crenshaw, Ware and Johnson, Norfolk, Virginia.

#### OPINION

Appellant urges that the presumption of negligence accompanying an allision should not be applied to suspension and revocation proceedings. I do not agree.

I have consistently held that the rebuttable presumption of negligence which arises when a moving vessel strikes a fixed object applies to these suspension and revocation proceedings. Appeal Decisions No. 2325 (PAYNE), 2284 (BRAHN), and 2264 (McKNIGHT). As discussed in these cases, the presumption is well established in maritime law. I do not believe that the Coast Guard should have a different rule.

#### II

Appellant also argues that he has rebutted the presumption by showing that he navigated the flotilla with proper care. The evidence does not support Appellant's position.

Appellant urges that he "was required to bring the tug and barge to a berth on the opposite side of the unlighted pier, in close quarters with an adverse tide and weather. Furthermore,...if the pier had had a reasonable or the expected fender system the barge would have moved along side without any damage." "The Respondant was misled by an employee of the pier owner regarding the depth of the water at the pier, which is such a vital factor in a berthing operation." In his brief, Appellant admits that moving the vessel to the other side of the pier under the prevailing conditions was "a task [he] considered risky because of the steady wind and strong ebb tide...."

Appellant was aware of the wind and current and the fact that they would make his approach to the pier more difficult. He should have taken them into account in deciding whether it was safe to move. He should also have determined, before leaving the west side of the pier, whether the fenders on the east side of the pier were adequate for his planned approach. If the current was too strong to permit the movement to be accomplished safely, he should have waited for slack water.

Appellant was apparently concerned about the depth of the water prior to the movement and inquired about it of a terminal facility employee. While such inquiry is not improper, it does not relieve Appellant of the responsibility for knowing the information shown on the chart. Since the depth of the water near the piers in the area was clearly shown on the chart, Appellant was responsible, as the Operator of the vessel, for knowing it and how it would affect his vessel. The master or operator of a vessel is expected to know the available information regarding the waterway that he is traversing and the characteristics of his vessel. See Appeal Decisions Nos. 2302 (FRAPPIER), and 2272 (PITTS). Failure of a master or operator of a vessel to make proper use of such information with the result that he chooses to move his vessel when the state of the tide and weather make that dangerous is negligence. See Appeal Decision No. 2302 (FRAPPIER). This is what occurred here. Even if the Administrative Law Judge had not based his finding of negligence on existence of the presumption, he could properly have found negligence proved apart from it.

Appellant also argues that he established that he was navigating with due care because of the slow speed with which he brought the flotilla to the pier and that the damage to the pier was the result of its fragile nature. His arguments ignores the testimony of the terminal operator that about 50 barges per month use the pier and that it is not unusual for them to use the berth on the east side. It also ignores the fact that the barge knocked down two thirteen pile cluster dolphins as it proceeded into the pier. This amply supports the Administrative Law Judge's

conclusion that Appellant's approach to the pier was not so gentle as he claims and not so careful as to rebut the presumption of negligence.

For the above reasons, none of Appellant's assertions are sufficient to rebut the presumption of negligence. They, in fact, established that he undertook to move the flotilla at a time that he knew such a movement was hazardous and without properly determining the conditions which he would encounter on the east side of the pier.

#### CONCLUSION

There is substantial evidence of a reliable and probative nature to support the findings of the Administrative Law Judge. The hearing was conducted in accordance with the applicable regulations.

#### ORDER

The order of the Administrative Law Judge dated at Norfolk, Virginia, on 22 April 1983 is AFFIRMED.

B. L. STABILE  
Vice Admiral, U. S. Coast Guard  
VICE COMMANDANT

Signed this 5th day of September, 1984.